

International Private Law, Consumers and the Net.

A confusing maze or a smooth path towards a Single European Market?

Charlotte Waelde[♦]

Trade across borders was once largely confined to transactions as between businesses. Commercial links could be forged and exploited in the international market place where disputes would be settled by reference to carefully crafted rules rooted in legal theory¹ used *inter alia* to decide which courts should have jurisdiction to hear a dispute and which law should be applied.

Further the parties, generally well advised, could look after their own interests. As part of a risk management strategy contractual terms could stipulate the extent of the risk to be borne by each party, and in the event of a dispute could dictate the forum in which that dispute would be heard and the law that would be applied. Only the unwary or ill advised would need to fall upon the broad back of the general law. The precedents set by those disputes could, in turn, be used to shape future behaviour.

And so international trade flourished – between businesses. Seldom would a consumer step outside the confines of her home shores to make a purchase from another territory. If she did, it was generally small. Perhaps a trophy brought back from a holiday in the sun, or a memento for a partner when returning from a business trip.

However with the Internet revolution that, at least in relation to consumers, has changed. Now the international sourcing of goods and services is not confined to the larger commercial interest. Rather, the development of the Internet has meant that anyone can get involved in buying and selling across borders, and that includes small suppliers and consumers. Within Europe statistics suggest that the majority of e-

[♦] Dr. Charlotte Waelde Co-director, AHRB Research Centre for Studies in Intellectual Property and Technology Law, University of Edinburgh. Thanks are due to Julia Pothmann, LL.M.Eur., PhD scholar at the Max-Planck-Institute for Intellectual Property Law, Munich for very helpful comments on an earlier draft.

¹ Anton with Beaumont, *Private International Law*. W. Green 2nd ed 1990 Ch. 2.

commerce transactions take place as between businesses (B2B).² By contrast, by far the most legislative initiatives have been designed to regulate the business to consumer (B2C) marketplace.³ It is in this sector that debate has been fierce over two regulatory paradigms: country of origin versus country of destination.

Roughly translated the country of origin principle can be understood to mean that a business can carry with it wherever it trades its own home country regulation and law. Conversely the country of destination principle means that the law and regulation of the country where goods or services are received apply to a transaction.

Illustration:

If a supplier of Sancerre in France sold wine to a consumer based in Scotland, country of origin regulation would mean that it would be French rules that applied: in other words, the rules of the place of the supplier. Conversely, country of destination regulation would mean that it would be the rules of the UK that applied: the rules of the place of the consumer.⁴

It is country of origin regulation that has, in principle, been chosen for incorporation into the E-commerce Directive⁵ and logically into the UK Regulations implementing that Directive.⁶

Clearly such a rule is highly advantageous for a business which needs only to be appraised of one set of rules that will be applicable to its activities. Those in charge of the business can trade in the confident knowledge that so long as they comply with

² See e.g. <http://www.oecd.org/dataoecd/34/61/2077266.pdf>

³ A number of Directives have been passed in the EU in the field of consumer protection. For example Consumer Credit (90/88) Distance Selling (97/7 EC), Doorstep Selling (85/577 EEC), General Product Safety (92/59 EEC), Injunctions – Stop Now Orders (98/27 EC), Misleading and Comparative Advertising (84/450 EEC and 97/55 EC), Package Travel (90/314 EEC), Price Indications (98/6 EC), Product Liability (99/34 EEC), Sale of Goods and Associated Guarantees (99/44/EC), Timeshare (94/47 EC), Unfair Contract Terms (93/13 EEC).

⁴ For an article discussing the E-commerce directive and using *Yahoo! Inc. v La Ligue Contre Le Racisme et L'Antisemitisme* Final Order T.G.I. Paris Nov. 20, 2000 as a case study see Kightlinger, 'A solution to the Yahoo! Problem? The EC E-commerce Directive as a model for international cooperation on Internet choice of law' 24 Mich. J. Int'l L. 719.

⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (the E-commerce Directive).

⁶ The Electronic Commerce (EC Directive) Regulations 2002, SI 2002 No. 2013

the regulations of their own domestic system, those are the standards by which they will be judged, no matter the recipient country.

But as ever, matters are not so simple, particularly in the context of consumer contracts. There is a derogation from the country of origin principle in the E-commerce Directive specifically for consumer contracts which would seem to apply a country of destination approach through the application of the general rules of international private law, in particular the Brussels Regulation dealing with jurisdiction,⁷ and the Rome Convention dealing with choice of law.⁸ However, it would seem to be unsettled as to which elements of the relationship between the supplier and consumer are subject to the country of destination principle, and which to the country of origin approach. As will be argued in this paper, the result, in the context of consumer contracts, might be considered a confusing maze rather than providing a smooth path to the single European market.

To explain the debate this article will first examine the genesis of the country of origin approach to regulation and explain how it has operated in the broadcasting sector in Europe. In the ensuing discussion on the E-commerce Directive and the UK Regulations implementing the Directive the focus will be on two arguments that have accompanied these instruments. The first is the debate as to the meaning of the country of origin principle, and the second is as to the scope of the derogation concerning consumers. The discussion will move to the Rome Convention and the Brussels Regulation analysing the rules on choice of law and jurisdiction in those instruments. Finally the question will be asked as to whether all the hiatus in this area really matters anyway particularly given that a consumer is unlikely to use court procedures in respect of transactions that may have little financial value. There are alternative mechanisms by which the consumer may protect herself in the e-commerce marketplace. Throughout this paper the discussion will be limited to

⁷ Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters which came into force on 1 March 2002. The Regulation is applicable throughout the EU except for Denmark.

⁸ EC Convention on the Law Applicable to Contractual Obligations (Rome 1980)

consumer contracts that are effected between a supplier and a consumer located within different countries in the EU.⁹

Terminology: country of origin and country of destination

Within the EU the country of origin principle first appeared in the Television Without Frontiers Directive.¹⁰ That Directive (as amended¹¹) establishes a legal framework for the free movement of television broadcasting services in the EU to promote the development of a European market in broadcasting and related activities such as television advertising and the production of audiovisual programmes. It does this by seeking to ensure that only one Member State has competence to regulate activities within the fields co-ordinated by the Directive¹², the intention being to ensure the freedom to provide services throughout the EU without being subject to possibly contradictory regulatory regimes. The Directives make it clear under which Member State's jurisdiction television broadcasters fall. This question is determined mainly by reference to where their central administration is located and where management decisions concerning programming are taken.¹³

However, the country of origin principle is not absolute and can give way to country of destination influence in certain circumstances. This can be seen in *Konsumentenombudsmannen v. Agostini Förlag and TV-Shop i Sverige*¹⁴ a case which concerned inter alia the re-transmission of broadcasts into Sweden, Norway and

⁹ Different rules apply where either the consumer or supplier are outwith the EU and also as between domiciliaries within the UK. For the UK implementing provisions see Civil Jurisdiction and Judgments Act 1982 as amended e.g. Schedule 4 for intra UK disputes and Schedule 8 for Scottish and non-EU disputes.

¹⁰ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities

¹¹ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. The Directives are currently under review with many broadcasters commenting favourably on the operation of the country of origin rule and expressing the view that the rule should not be changed. See generally http://europa.eu.int/comm/avpolicy/index_en.htm.

¹² Article 3 of Directive 89/552/EEC.

¹³ The ECJ has made it clear that a Member State cannot object to the re-transmission on its territory of programmes broadcast by a television broadcaster body within the jurisdiction of another Member State where it considers that the programmes of the latter State do not meet requirements of article 4 and 5 of the Directive, since this is a matter the assessment of which is within the field of control of the State of origin Judgement of 29 May 1997 Preliminary Decision - *Paul Denuit v. Kingdom of Belgium* C-14/96

¹⁴ Judgement of 9 July 1997 C-34, C-35, C-36/95.

Denmark from the UK. These broadcasts contained advertisements that were lawful in the country of origin (the UK) but contrary to the Swedish law on Marketing Practices¹⁵ (the country of destination). The question arose as to whether the Swedish authorities could exercise any control over the content of these advertisements. The ECJ held that the Directive does not in principle preclude application of national rules with the general aim of consumer protection provided that does not involve secondary control of television broadcasts in addition to the control which the broadcasting Member State must carry out.¹⁶ In other words, the Swedish authorities were able to exercise some control over the content of the advertisements in accordance with their domestic law, but that control only took effect after the re-broadcast had been transmitted and could not prevent transmission of the broadcast itself.¹⁷

So from this it seems that although the TV Without Frontiers Directive posits as a general rule country of origin regulation, it is not absolute. It does not preclude the authorities in the country of destination exercising regulatory oversight and as a result no-doubt influencing the behaviour of the advertisers. As will be seen in the discussion on the E-commerce Directive not only does the meaning of the country of origin paradigm seem to have troubled commentators possibly more so than with the TV Without Frontiers Directive, but in addition, and in common with the broadcasting sector, the scope of the rule remains unclear.

The E-commerce directive and the ‘fudge’ on questions of applicable law.

Arguments have raged as to the meaning of the country of origin rule to be found in the E-commerce Directive.¹⁸ Three suggestions have been made as to the interpretation of the rule:

¹⁵ Article 2 of the Swedish Marknadsföringslag (1975:1418)

¹⁶ fn. 13 Para 38.

¹⁷ The ECJ noted in particular that that Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17), which provides in particular in Article 4(1) that Member States are to ensure that adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors and the general public, could be robbed of its substance in the field of television advertising if the receiving Member State were deprived of all possibility of adopting measures against an advertiser and that this would be in contradiction with the express intention of the Community legislature. Para 37.

¹⁸ E-commerce Directive Article 3.1.

1. the rule amounts to an additional rule on international private law by designating the applicable law;
2. the rule means that the conflicts laws of the country of establishment of the service provider (ISSP) determine which law applies to any particular dispute;
3. the rule only concerns the substantive law (after the conflict laws have been applied normally) and prohibits the application of stricter rules than those of the country of origin (the restrictions test).¹⁹

In laying out the country of origin principle, Recital 22 of the E-commerce Directive provides that *‘Information society services should be supervised at the source of the activity...such information society services should in principle be subject to the law of the member state in which the service provider is established’*, and Article 3, the Internal Market measure, provides *‘Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.’*

Suggestion 1: the rule amounts to an additional rule on international private law by designating the applicable law;

Under this suggestion and in order to determine whose law applies to a certain set of facts it would be necessary to look at where the information society service provider²⁰ (ISSP) (in the example given above, the supplier of Sancerre) is established²¹ and apply that law as the applicable law (so long as the activity under question falls within

¹⁹ Note Hellner, M *‘The Country of Origin Principle in the E-commerce Directive – A Conflict with Conflict of Laws?’* European Review of Private Law 12 (2): 193-213, 2004 who argues that there are three ways in which the country of origin principle could be understood: (i) as a choice of law rule for the law applicable to e-commerce services; (ii) as only setting out certain limitations to the application of the designated law; (iii) as making the rules of the home country of the service provider internationally mandatory and thus applicable irrespective of what law is applicable to the contract or tort.

²⁰ *‘Information society services’* are defined as services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC and a *‘service provider’* as any natural or legal person providing an information society service. E-commerce Directive Article 2.

²¹ An *‘established service provider’* is defined as a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required do not, in themselves, constitute an establishment of the provider. E-commerce Directive Article 2.

the co-ordinated field²²). In other words, the country of origin rule is a choice of law rule and as such prevents conflict of laws questions arising by subjecting an ISSP to the law of its establishment. This analysis would be consistent with Recital 55 and Article 3.3 referring to the derogations from the internal market clause. Recital 55 provides that the Directive *does not affect the law applicable to contractual obligations relating to consumer contracts*; Article 3.3 specifically dis-applies the internal market article to those fields specified in the Annex. Included within those fields are *contractual obligations concerning consumer contracts*. It can be argued that these specific derogations are necessary because the country of origin rule is a choice of law clause. If that were not so, what would be the point of including these derogations in the Directive? Thus one interpretation is that the country of origin rule is a choice of law rule which can be derogated from in the limited circumstances set out in the Annex to the Directive.

But this interpretation takes no account of the first sentence of Recital 23²³ and Article 1.4 of the Directive, the latter of which states that ‘*This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts*’. It is this measure that has caused much uncertainty as to the meaning of the country of origin rule. It is arguable that by interpreting the country of origin provision as a rule designating the applicable law, that amounts to an additional rule of international private law.

Suggestion 2: the rule means that the conflicts laws of the country of establishment of the service provider (ISSP) determine which law applies to any particular dispute;

²² The coordinated field concerns requirements with which the service provider has to comply in respect of: (i) *the taking up of the activity of an information society service, such as requirements concerning information society service; qualifications, authorisation or notification, the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, including those applicable to advertising and contracts, or requirements concerning the liability of the service provider;* (ii) *The coordinated field does not cover requirements applicable to goods as such, requirements applicable to the delivery of goods, requirements applicable to services not provided by electronic means.*

²³ Recital 23 states *This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of international law must not restrict the freedom to provide services established in this Directive.* E-commerce Directive Article 2.

The second suggestion is to interpret the country of origin rule as designating a particular legal system. If that is the case, analysis might proceed as follows. The first step would be to look at the establishment of the ISSP (the supplier of Sancerre) – in other words the country of origin. This explains the importance of the country of origin rule. However, the second step would be to apply the conflict laws of that country to determine which law applies to any particular dispute. In other words, the country of origin rule merely points to a particular legal system as a first step in the process. The conflict rules of that legal system should then be considered to determine which law should be applied.

Suggestion 3: the rule only concerns the substantive law (after the conflict laws have been applied normally) and prohibits the application of stricter rules than those of the country of origin (the ‘restrictions test’).

The third suggestion leads on from application of the second, but tries to take into account the wording of the second sentence in Recital 23: ‘*provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive*’ and of Article 3.2 ‘*Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.*’ This has been called by some the ‘restrictions test’. Broadly it means that if application of the applicable law (chosen after the application of the relevant conflict laws) turns out to be more strict than the law of the ISSP, that would result in a restriction on the ability to provide information society services. Therefore the more strict law cannot be applied because it would ‘*restrict the freedom to provide information society services*’.

Illustration:

Under the first option, if a French supplier supplied bottles of Sancerre to a Scottish retailer and the country of origin rule designated a particular law (i.e. that of the country of origin) to be applied in the event of a dispute, then French law would apply to that particular problem. Under the second option, where the country of origin rule designated a particular legal system (that of the establishment of the ISSP – the

supplier of Sancerre), then French conflict of laws rules would be applied to determine which law should be applied to that dispute. That, in turn, may or may not be French law. Leading on from that and under the third option, French conflicts rules would determine which law was applied, (e.g. British law), but that law could only be applied if it was no more strict than the law of the country of origin – French law.

It is easy to see how complex arguments could become in deciding the applicable law to be applied to any dispute.²⁴ Suffice it to say, academic argument in respect of these differing interpretations might have quietened, but it has not gone away. Attention has now shifted as to how these measures have been incorporated into implementing Regulations in the Member States. It is as to the decisions taken in the UK that we now turn.

UK Implementing Regulations

In the first draft of the implementing regulations, the UK Government included a slightly modified version of the internal market clause²⁵ and also sought to transpose Article 1.4 of the directive almost verbatim.²⁶ In other words, this same tension relating to the meaning of the country of origin principle in juxtaposition with the text stating that no new rules on international private law were established remained. The Government anticipated that that the effect of this was that *'UK courts will continue to follow the requirements of the Private International Law (Miscellaneous Provisions) Act 1995 but that the application of the law dictated by them would be subject to a restrictions test in accordance with the internal market provisions of the Regulations.'*²⁷

Needless to say many commentators who responded to the consultation document rehearsed the points made in the last section of this paper and stressed the uncertainty

²⁴ For a proposal for a convention on the liability of online information publishers see Reed *'Liability of Online Information Providers – Towards a Global Solution'*, 2003 International Review of Law Computers & Technology Vol 17/3 pp. 255-265.

²⁵ Clause 7 Draft Regulations at http://www.dti.gov.uk/industry_files/pdf/regulations.pdf

²⁶ Clause 5 of the Draft Regulations http://www.dti.gov.uk/industry_files/pdf/regulations.pdf

²⁷ Guide for Business to the Electronic Commerce (EC Directive) Regulations 2001. Interim Guidance Para 3.6. Available at http://www.dti.gov.uk/industry_files/pdf/guidance.pdf

that taking this course of action would result in for ISSPs who would be unsure of precisely which rule applied. The uncertainty would be likely to remain until such time as the ECJ has had the opportunity to resolve the conflict. Bowing to pressure, the Government removed the international private law clause (clause 5) from the final version of the Regulations saying not only that *‘On balance, [the Government] agrees that the country of origin regulation should take precedence and has removed the provision on private international law accordingly’*²⁸, but also that *‘The Government has ... looked to the purpose of the Directive in informing its approach. This is expressed in Article 1(1) as “ensuring the free movement of information society services between the Member States” and qualified by the statement in recital 22 that “such information society services should in principle be subject to the law of the Member State in which the service provider is established”. Taken together, Regulations 4(1) to 4(3) will, if replicated by other Member States, provide for what might be termed country-of-origin regulation’*.²⁹ Whether the Government’s optimism is overstated remains to be seen.

So in the Regulations as implemented, the internal market clause provides (with certain exclusions³⁰) that:

- any requirement that falls within the co-ordinated field will apply to the provision of an information society service by a service provider established in the UK irrespective of whether the information society service is provided in the UK or another Member State;³¹
- enforcement authorities are required to ensure compliance with that requirement;³²
- any requirement falling within the co-ordinated field is not to be applied to the provision of an information society service by a service provider established in a member State other than the UK.³³

²⁸ Electronic Commerce (EC Directive) Regulations 2002, Public Consultation – Government Response 2002

²⁹ Guide for Business to the Electronic Commerce (EC Directive) Regulations 2003, Para 4.8

³⁰ Regulation 4: Those activities excluded from this provision are set out in the Annex to the Directive and include contractual obligations concerning consumer contracts.

³¹ Regulation 4.1

³² Regulation 4.2

³³ Regulation 4.3

This is complex wording which would seem to fall short of what many may have wanted to see in the Regulations – a clear statement that ISSPs established in the UK must comply with UK law for their activities that fall within the co-ordinated field.³⁴ One assumes from the optimistic statements made by the Government repeated above, that it is the Government's view that country of origin rule as it has been implemented in the Regulations means just that: that (subject to the discussion below) it will be the law of the place of the establishment of the service provider that applies to activities within the co-ordinated field.

The derogation for consumers

Having come this far as to establish, in terms of the UK implementing Regulations, that it is (arguably) the 'home law' of the ISSP that takes precedence, it has to be appreciated that this is not absolute. Not only can UK based enforcement authorities take action against ISSPs where necessary for the protection of consumers³⁵ but in addition, and following protracted argument about the protection of consumers who engage in e-commerce, contractual obligations concerning consumers³⁶ are exempt in both the Directive³⁷ and the UK implementing Regulations.³⁸ This should mean that it is the law of the consumers' habitual residence that applies to contractual obligations concerning consumer contracts.³⁹ But that of course begs the question as to what a contractual obligation concerning a consumer contract is.

The suppliers and the consumers: poles apart

There has been a bitterly contested war of words between suppliers and consumers as to whether the E-commerce Directive should reflect the country of origin or the

³⁴ As has been implemented in some other countries eg. Luxembourg Article 2.4. of their law states *'The legislation of the place of business of the information society service provider shall be applicable to providers and the services they provide, without prejudice to the freedom of the parties to choose the law applicable to their contract.'* Law available at http://www.etat.lu/memorial/T01_a/tablealp.html
Austria Part 6, § 20(1) *'In the co-ordinated field (§ 3(8)), the legal requirements for a service provider established in a Member State shall be determined in accordance with the law of such state'*. Law available at <http://www.bgb.at/CIC/BASIS/bgbpdf/www/pdf/DDD/2001a15201>

³⁵ E-commerce Directive Article 3(4)(1). Regulations 5 (1)(d)

³⁶ E-commerce Directive Article 2(e). Regulations 2 *'consumer means any natural person who is acting for purposes other than those of his trade, business or profession'*.

³⁷ Recitals 55, 56. Article 3(3) and Annex

³⁸ Regulation 4(4) and Annex

³⁹ Recital 55. For the reason why see the section below on the EC Convention of the Law Applicable to Contractual Obligations (Rome 1980) (Rome Convention).

country of destination approach to regulation in the field of consumer contracts.⁴⁰ These opposing views can be simply stated. The suppliers argue that if they are to engage in B2C e-commerce, then they must be able to do so within an environment that not only promotes certainty in legal dealings but does so in a manner in which legal and business risks are both known and capable of management. The application of country of destination rule that might result in a supplier being sued by a consumer in the courts of the consumers' domicile and thus exposing the supplier to the potential of being sued in each and any one of the Member States of the EU, is an unmanageable risk. Equally, rules on choice of law that require a supplier to trade in accordance with the consumer protection laws in each of the Member States of the EU, and potentially liable if he does not, are unreasonable and unworkable both in terms of knowledge of the rules and in terms of cost for compliance. As a result the supplier will not engage in e-commerce across borders and the Single European Market will not become a reality.

Unsurprisingly, consumers (or rather their representatives) hold the opposite view. Consumers argue that they must both be able to sue in the courts of their home country, and that the consumer protection laws of their country should apply to a cross border transaction. Any other rule, and in particular the country of origin rule applying the laws of the supplier to a consumer transaction and requiring the consumer to sue in the courts of the suppliers domicile, would effectively deny the consumer access to justice. A consumer does not have the financial means to pursue a trader in the traders' home country, nor knowledge of the traders' laws. Any transaction in which the consumer engages is likely to be of (relatively) small value, and thus not worth pursuing across borders. If a consumer cannot sue a supplier in her home courts using her own familiar laws then she will not engage in e-commerce across borders and the Single European Market will not become a reality.

Consumer protection in the Directive and the implementing Regulations

The Directive makes it clear that the scope of the co-ordinated field reaches into *'requirements relating to on-line activities such as on-line information, on-line*

⁴⁰ This dichotomy was also one that bedevilled the negotiations surrounding the revision of the Brussels Convention. See generally *'Hearing on electronic commerce Jurisdiction and applicable law 4-5 November 1999. Position papers submitted to the European Commission'*. <http://europa.eu.int/comm/scic/conferences/991104/contributions.pdf>

advertising, on-line shopping, and on-line contracting’ but that it does not cover ‘*legal requirements relating to goods such as safety standards, labelling obligations or liability for goods*’.⁴¹ Further, consumer contracts ‘*should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract*’.⁴² Does this include pre-contractual matters such as advertisements? Contractual matters as embodied in the agreement between the parties and relating to such measures as the quantity and description of the goods (ten bottles of Sancerre 1999)? Does it also encompass implied terms, such as the quality of the goods? Certainly it would appear that public law regulations relating to the process of manufacture are outwith the scope of the measures. But what lies within is far less certain.

When the UK Government was implementing these obligations the first approach was to transpose the text of the derogation in the Directive verbatim into the Schedule to the Regulations.⁴³ However, the advice given in the interim Guide to Business⁴⁴ went on to elaborate on what might be covered, and in doing so appears to have drawn on the Recitals laid out above. In this the Government interpreted the derogation as applying to:

- *the question of which law is applicable to the substance of a dispute, including contractual obligations/rights;*
- *essential information that has a determining influence on the decision to contract, which must be provided in accordance with the requirements of the consumer’s Member State;*
- *requirements applicable to such contractual obligations, including requirements to do certain things before entering into a contract (e.g. provide information about cancellation rights under the provisions of timeshare legislation).*

⁴¹ Recital 21 Article 2 (ii) Regulations 2

⁴² Recital 56

⁴³ Schedule to the Draft Regulations at http://www2.dti.gov.uk/industry_files/pdf/regulations.pdf

⁴⁴ Fn 25 above

Once again there was some disquiet from a number of commentators who considered that the extent of these derogations from the country of origin principle were excessive in that they extended both to pre- contractual measures as well as to the terms of the contract. This, it was argued, was not warranted in terms of the Directive. In particular it was argued that as most B2C commerce involves some sort of contract, if pre-contractual measures were included within the scope of the derogation, the derogation would swallow the rule. Having listened to the discussion, the Government clearly had sympathy for that argument. Whereas the wording of the final Guide to Business remains the same,⁴⁵ that wording differs from the Government response to the consultation which suggests that the derogation will apply to:

- *the law applicable to the substance of a dispute, including contractual obligations/rights,*
- *information provided by traders about consumers' rights;*
- *other essential information that has a determining influence on the decision to contract.*
- *laws that bear on the terms of the contract (e.g. rules on implied terms, certain cancellation rights and the circumstances in which an agreement is unenforceable).*

It would appear that the scope of the advice is narrower than the wording in the Guide. For instance there is no reference to '*essential information having a determining influence on the decision to contract being supplied in accordance with the consumers' Member State*'. Certainly the words '*other essential information*' remain but there is no reference to the consumers' Member State. In addition the wording '*including the requirement to do certain things before entering into a contract*' has been removed even if the obligation to provide information in relation to cancellation rights remains albeit narrowed to '***certain*** cancellation rights' (emphasis added).

Despite this, the *scope* of the derogation remains unclear.

⁴⁵ Electronic Commerce (EC Directive) Regulations 2002, Public Consultation – Government Response 2002.

The Rome Convention and the applicable law

As the Directive and Regulations would appear to point to the consumers country to determine the applicable law for contractual obligations concerning consumer contracts (subject to the discussion above), this section will analyse the relevance of the Rome Convention on the law applicable to contractual obligations 1980 (the Rome Convention) which has been transposed into UK law by way of the Contracts (Applicable Law) Act 1990 (as amended). Both of these instruments deal with matters of applicable law.

The main principle in deciding the applicable law in the Rome Convention is that of freedom of choice.⁴⁶ In other words, the parties are free to choose which law should apply to their dealings. However, special provisions apply to consumer contracts.⁴⁷ These are set out in Article 5. These apply to a contract⁴⁸ the object of which is the supply of goods or services to a consumer for a purpose which can be regarded as being outside his trade or profession. In the absence of choice, the contract will be governed by the law of the country in which the consumer has his habitual residence. However, if the parties have expressed the law that will govern the contract, that will not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence.⁴⁹ Thus if there is no choice of law clause in the contract, it will be governed by the laws of the place where the consumer has his habitual residence. However, if there is a choice of law clause which refers to something other than the law of the consumers habitual residence, then the law referred to in the choice of law clause will apply except to matters falling within the mandatory rules of the consumers habitual

⁴⁶ Rome Convention Article 3.1.

⁴⁷ See Report on the Convention on the law applicable to contractual obligations by Giuliano and Lagarde OJ No C 282; 31/10/1980 p. 23. Available at http://www.rome-convention.org/instruments/i_rep_lagarde_en.htm

⁴⁸ But not to a contract of carriage, except an inclusive tour contract providing for a combination of travel and accommodation, or a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence. Rome Convention Articles 5(4) and (5)

⁴⁹ Rome Convention Article 5(2)

residence. Thus different parts of a consumer contract may be governed by the laws of two (or more) countries.⁵⁰

Illustration

A Scottish consumer purchases Sancerre from a French supplier under a contract with a choice of law clause making French law applicable to the contract. French law will govern but UK mandatory rules will apply in the realm of consumer protection.

Two points arise from this. First, the derogation only applies if one of the tests in Article 5(2) of the Rome Convention is met:

- *in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract; or*
- *the other party or his agent received the consumer's order in that country; or*
- *the contract was for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.*⁵¹

Second, what is meant by the *mandatory rules* of the law of the country in which the consumer has her habitual residence?

Specific Invitation and Advertising

Turning to the first point. If the protective provisions are to apply for the benefit of the consumer, the contract must meet one of the conditions set out in Article 5(2). Of particular note for e-commerce matters is the first indent. What is meant by the contract being preceded by *a specific invitation addressed to him* and by *advertising*? What amounts to a specific invitation? Would an e-mail from an e-tailer advertising a sale and sent to a distribution list (to those who had opted in for such

⁵⁰ Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation. Presented by the Commission Brussels 14.1.2003. COM (2002) 654(01) final p 28.

⁵¹ Rome Convention Article 5(1)(2).

communications⁵²) amount to a specific invitation to each recipient? Would the techniques used by e-tailers such as amazon.com whereby a web site is 'personalised' each time you visit it with details of products that have been identified as potentially suitable amount to a specific invitation? Would (an intensely annoying) pop-up advertisement amount to a specific invitation? And what about *advertising*? A distinction is sometimes made between passive and active websites. A passive website is generally seen as one which supplies information but does little more. By contrast an active website is one with which the consumer can interact by, for example, ordering goods on line.⁵³ Does the mere provision of a passive website amount to advertising? In these circumstances a consumer has to take the initiative to find the website. Is this not more akin to a consumer reaching out to the e-tailer, rather than the e-tailer advertising his wares to the consumer? Is the test to be subjective; in other words, what appears to be the intention of the website owner assessed from the facts and circumstances? Or is the test objective; in other words what is to be inferred from an objective assessment of the website and the surrounding circumstances?

In the pre-Internet days, these questions may have resulted in relatively clear answers. For instance, the French supplier of Sancerre might have decided to target consumers in the South of England by way mail-shot, knowing the legal requirements of that system. Or he might advertise in a newspaper with a circulation largely restricted to a similar territory. In these circumstances it would seem clear that the criteria in the Article would be met. The supplier would have taken active steps to enter the consumers' state. It is a lot less clear that the mere provision of a passive website would fulfil the criteria necessary to bring it within the protective provisions of

⁵² See Chapter X (spam)

⁵³ This is a concept that has been used notably in the States when considering questions of jurisdiction. See *Zippo Manufacturing Company v Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (1997) *At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. E.g. Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996). *At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. E.g. Bensusan Restaurant Corp., v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996). *The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. E.g. Maritz, Inc. v. Cybergold, Inc.*, 940 F. Supp. 96 (E.D.Mo. 1996). See also Fn 79 below.

Article 5(2). The analysis might tend to point to the opposite conclusion – that the consumer had entered the territory of the supplier. An analogy could perhaps be drawn with the UK cases of *800-Flowers Trade Mark*⁵⁴ and *Euromarket Designs Market v Peters Ltd*⁵⁵, both cases concerning the question of whether a trade mark had been used in the UK. Jacob J said that the content providers could not be said to have intended to reach the UK market:

‘the mere fact that websites can be accessed anywhere in the world does not mean... that the law should regard them as being used everywhere in the world. It all depends on the circumstances, particularly the intention of the website owner and what the reader will understand if he accesses the site’.

Jacob J seems to be suggesting that the test is an objective one: what can be gleaned from an objective assessment of the intention of the website owner as evidenced by both the site and the surrounding circumstances.⁵⁶ An objective assessment of a website provided by an e-tailer might take into account such matters as the language of the site, the currency, and perhaps whether disclaimers are used stating which territories the trader is prepared to supply.

Suffice it to say that it is not yet clear as to what type of on-line e-tailing activity might satisfy these criteria. Some points may be clarified in due course as the European Commission is currently conducting a review of the Rome Convention suggesting *inter alia* that Convention should be converted into a Community Instrument and that the scope of the consumer protection measures might be revisited. Suggestions for reform include: (a) broadening those circumstances in which the mandatory consumer protection rules of the consumer’s habitual residence apply to a consumer contract provided the supplier is in a position to know where that is⁵⁷; (b) systematic application of the law of the consumer’s place of residence⁵⁸; (c) bringing

⁵⁴ [2000] FSR 697, 705, confirmed on appeal [2001] EWCA Civ 721.

⁵⁵ [2000] ETMR 1025, 1031.

⁵⁶ For a much fuller discussion in the context of jurisdiction see Kohl, *An Analytical Framework on Regulatory Competence over Online Activity* p129 unpublished dissertation, University of Canberra 2003.

⁵⁷ Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation. Presented by the Commission Brussels 14.1.2003. COM (2002) 654(01) final p 28. (Green Paper) Para 3.2.7.3. (iii).

⁵⁸ *ibid* para 3.2.7.3 (v).

the test into line with that to be found in the Brussels Regulation which refers to ‘directing activity to’⁵⁹ (see further the discussion below); and (d) making the main rule the law of the consumers habitual residence and allowing derogation for the application of a limited number of other laws only in narrowly defined circumstances.⁶⁰

The consultation period is currently underway. It remains to be seen which test is finally chosen although it is not hard to predict the views that will be expressed by the suppliers and the consumers, or that those views will diverge.

Mandatory Rules

The second main issue that arises from the discussion on the Rome Convention is that of mandatory rules. It will be recalled from the discussion above that where the protective mechanism in Article 5 applies for the benefit of consumers, then the consumer is not to be deprived of the protection afforded to him by the *mandatory rules* of the law of the country in which he has his habitual residence. What are these mandatory rules? The definition of mandatory rules is not easy, and different Member States offer differing interpretations.⁶¹ Very broadly mandatory rules can be considered to be those rules from which the parties cannot derogate by contract.⁶²

But that definition does not help deciding exactly which rules are mandatory in the context of consumer protection. There seems to be no European, or even UK list of exactly which consumer protection laws would fall under this head. In the Green Paper it is suggested that mandatory rules ‘*involve[s] in particular the right of the consumer to withdraw from the contract and to be protected against unfair terms,*

⁵⁹ *ibid* Para 3.2.7.3 (vi).

⁶⁰ *ibid* Para 3.2.7.3 (viii).

⁶¹ For a discussion see Hellner, *The country of origin principle in the E-commerce Directive: A conflict with conflict of laws* Riga Graduate School of Law Working Paper 2003 No. 6 p 21 et seq.

⁶² The mandatory provisions referred to in Article 7(1) of the Rome Convention are more deeply embedded than those relating to consumers in Article 5. Article 7 mandatory rules (also called overriding rules) ‘*are relevant only in an international context and involves provisions to which a state attaches such importance that it requires them to be applied whenever there is a connection between the legal situation and its territory, whatever law is otherwise applicable to the contract*’. Green Paper Para 3.2.8.1. On mandatory rules see also e.g. M. Wojewoda, ‘*Mandatory Rules in Private International Law: With Special Reference to the Mandatory System under the Rome Convention on the Law Applicable to Contractual Obligations*’ 2000 7(2) *Maastricht Journal of European and Comparative Law* pp 183-213. Cheshire & North *Private International Law* 13th ed. Butterworths, 1999 p. 499. Wadlow, *Enforcement of Intellectual Property in European and International Law* (1998) para 7-92.

*such as those releasing the professional from liability in the event of damage’.*⁶³ But this of course raises further questions. Returning to the problem concerning the scope of the derogation from the country of origin rule for consumers outlined above,⁶⁴ the question that now arises is as to within the scope of that derogation, which elements of the contractual relationship between supplier and consumer might qualify as *mandatory rules*?

Illustration:

A consumer in the UK contracts to purchase a case of Sancerre from a French supplier, but then wants to cancel the contract. The UK has implemented the obligation in the Distancing Selling Directive to provide for 7 working days as a period in which the contract can be cancelled.⁶⁵ But the French suppliers website states that the consumer has 10 working days during which the contract can be cancelled.⁶⁶ Assuming that the cancellation period is within the scope of the derogation, is it also a mandatory rule? If it is, then application of that rule would appear to require that the lesser cancellation term (the consumers’ mandatory rule) be applied. That may be even if, for example, the cancellation period had a determining influence on the decision made by the consumer to enter into the contract. In other words, the consumer might ultimately be prejudiced by the application of the consumers’ mandatory rules.

There appear to be no absolute answers to these difficult conundrums. This is acknowledged in the Green Paper on the revision of the Rome Convention although perhaps the most useful suggestion made in that Paper to try and untangle some of the confusion is that *‘for legal matters already harmonised at Community level... the consumer protection rules of the law chosen by the parties should apply... Only in matters not harmonised at EC level, the consumer should not be deprived of the protection through the ‘mandatory rules’ of the law of the country of his habitual*

⁶³ Green Paper p.28 fn 55.

⁶⁴ See p X above

⁶⁵ Consumer Protection (Distance Selling) Regulations 2000, SI 2000, No. 2334. Working days means all days other than Saturdays, Sundays and Public Holidays. Reg 11. the period begins on the day on which the contract is concluded and ends on the expiry of 7 working days beginning with the day after the day on which the consumer received the goods.

⁶⁶ The French Code of Consumption requires 7 days from the day of the consumers order. The period can be extended by one day when the 7 days would end on a public holiday. Italian law provides for 10 working days. See www.retailing.org/ealaonline.pdf.

residence'. If the reader is looking for suggestions for a definitive list of what qualifies as a mandatory rule, she will be sorely disappointed.

Brussels Regulation

So far the discussion in this paper has been on choice of law. In this section questions of jurisdiction will be examined. In other words, which courts have jurisdiction in the event of a dispute between a consumer and a supplier engaging in an e-commerce transaction. The country of origin rule, being a conflicts of law rule, does not touch on matters of jurisdiction. Therefore to determine matters of jurisdiction within Europe it is to the Brussels Regulation on Jurisdiction and the Regulation and Enforcement of Judgments in Civil and Commercial Matters⁶⁷ (the Brussels Regulation) to which we turn.⁶⁸

The main rule in the Brussels Regulation (implemented in the UK by way of the Civil Jurisdiction and Judgments Act 1990 as amended) is that the defendant should be sued in the State in which she is domiciled.⁶⁹ This is supplemented by special rules for contracts,⁷⁰ tort⁷¹ and for the protection of consumers. The special rules determining jurisdiction in consumer contracts are to be found in Articles 13-15 of the Regulation.

These rules permit consumers to bring proceedings against another party to the contract in either courts of the Contracting State in which that other party is domiciled

⁶⁷ Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁶⁸ The Brussels Regulation replaced the Brussels Convention on 1 March 2002.

For completeness it should be noted that negotiations are currently underway to amend Rome II which deals with the law applicable to non-contractual obligations. As the Instrument goes beyond consumer contracts it will not be considered here. For further details see http://europa.eu.int/comm/justice_home/news/consulting_public/rome_ii/news_summary_rome2_en.htm

⁶⁹ Brussels Regulation Article 2.

⁷⁰ Brussels Regulation Article 5(1)(a). In relation to contractual jurisdiction the place of performance of the obligation in question is in relation to the sale of goods the place in a Member State where, under the contract, the goods were delivered or should have been delivered, and in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided.

⁷¹ Brussels Regulation Article 5(3). This has been interpreted by the European Court of Justice to include both the place where the damage occurred and the place of the event giving rise to it. Case 68/93 *Shevill v Presse Alliance* [1995] 2 AC 18. In Case 189/87 *Kalfelis v. Schröder* [1988] ECR 5565 the ECJ rules on the scope of 'matters relating to tort', and in effect excluded any case in which the parties are in a contractual relationship. This greatly reduces the relevance of this basis of jurisdiction in consumer cases.

or in the courts of the state in which she (the consumer) is domiciled.⁷² Proceedings may only be brought against the consumer in the courts of the Contracting State in which the consumer is domiciled.⁷³ In addition if the other party is not domiciled in a Contracting State but has a branch, agency or establishment in one state then as regards disputes arising out of the operation of that branch, agency or establishment the party shall be deemed to be domiciled in that state.⁷⁴ The rules may only be derogated from in limited circumstances which favour the consumer.⁷⁵

The consumer rules only apply in three types of situation. The first two apply where goods have been purchased with the assistance of credit and cover (i) contracts for the sale of goods on instalment credit terms⁷⁶ and (ii) contracts for a loan repayable by instalments or any other form of credit made to finance the sale of goods.⁷⁷

The third, and most important provision for these purposes, covers contracts other than those for credit purchase where: *‘the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities’*.⁷⁸

The question is obviously raised of what *‘directs such activities to’* means in the context of consumer e-commerce? Similar questions arise as those explored under the test of ‘advertising’ in relation to the Rome Convention. Is the test subjective or is it objective? If objective would that indicate that by the mere placing of the website on the Internet the supplier was directing activities at any consumer who cared to respond? If the website is merely a passive one, giving information to the consumer

⁷² Brussels Regulation Article 16(1).

⁷³ Brussels Regulation Article 16(2).

⁷⁴ Brussels Regulation Article 15(2).

⁷⁵ Brussels Regulation Article 17. *The provisions of this Section may be departed from only by an agreement: 1. which is entered into after the dispute has arisen; or 2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or 3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.*

⁷⁶ Brussels Regulation Article 15(1)(a)

⁷⁷ Brussels Regulation Article 15(1)(b)

⁷⁸ Brussels Regulation Article 15(1)(c)

but with little more can the supplier really be considered directing activity to the consumer? Or would the supplier merely be seen as inviting the consumer into his store, wherever that might be situated? What would be the position if only information about the products and services were made available on the site but that to enter into a contract a consumer was required to contact the trader by more conventional means, such as the telephone or by post? What if the supplier adds a facility to enable the consumer to make purchases using the website? Does it matter what currency is used on the site? Does it matter what language the site is in?

Disclaimers and websites: are they effective?

If the supplier felt he might be exposed to being sued in each and any of the member States of the EU he might feel that adding disclaimers specifying those jurisdictions in which he was prepared to do business, or perhaps more important, those in which he was not prepared to do business, might afford some protection. Would such a disclaimer be effective (it would certainly appear to act against the creation of a single European market)? During the passage of the E-commerce Directive through its legislative process in Europe, the European Parliament had proposed to take as one of the criteria concerning activities ‘directed to [at]⁷⁹ one or more member states, an attempt by an operator to confine its business to transactions with consumers domiciled in certain Member States.⁸⁰ One of the ways in which this might have been done was through the use of disclaimers. The amendment was not accepted by the Commission who opined: *‘the existence of a consumer dispute requiring court action presupposes a consumer contract. Yet the very existence of such a contract would seem to be a clear indication that the supplier of the goods or services has directed his activities towards the state where the consumer is domiciled’.*⁸¹ It would appear that the Commission considers the scope of the protection accorded to consumers to be broad.

⁷⁹ The words ‘directed at’ were used in the previous draft.

⁸⁰ See amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters COM (2000) 689 final p5

⁸¹ *ibid* p6

Other changes to the wording of the Directive made during the legislative process also show how problematic defining the scope of this test has been.⁸² A previous draft of the Regulation⁸³ had provided that:

*Account must be taken of the growing development of new communication technologies, particularly in relation to consumers; whereas, in particular, electronic commerce in goods or services by a means accessible in another Member States constitutes an activity directed to that State. Where that other State is the State of the consumer's domicile, the consumer must be able to enjoy the protection available to him when he enters into a contract by electronic means from his domicile.*⁸⁴

The explanatory memorandum to the draft explained that it was intended to include contracts concluded via interactive websites accessible in the consumer's state of domicile. However, passive websites that inform consumers about the possibility of goods and services would not be covered. In the latter instance, the consumer was to be treated as the active party who seeks out the site; just as she might travel to a foreign market or shopping mall. But the wording has been omitted from the final Instrument.

The Council and the Commission have issued a Joint Declaration on the interpretation of the phrase '*directs activities to*'.⁸⁵ In this Declaration it is suggested that it is not sufficient merely for activities to be targeted at a Member State of a consumers residence but that in addition, any contract must be concluded within that framework. The mere fact that a site is accessible is not enough. However, a factor to be taken into account is that the Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded by whatever means. The statement goes on to suggest that in this respect the language or currency does not constitute a relevant factor. The utility of the advice given in this declaration is open to debate.

⁸² . See generally '*Hearing on electronic commerce Jurisdiction and applicable law 4-5 November 1999. Position papers submitted to the European Commission*'.

<http://europa.eu.int/comm/scic/conferences/991104/contributions.pdf>

⁸³ COM (1999) 348.

⁸⁴ Recital 13

⁸⁵ The Brussels Regulation: The Council and Commission's Joint Statement on Articles 15 and 73. http://www.dti.gov.uk/ccp/topics1/guide/jurisdiction_eustate.htm. Unfortunately the statement is undated.

Indeed, it appears to be questioned by the DTI who, in their own guidance available on their website have said that where a site is based in England, where prices are expressed in sterling and which confines orders to UK customers might be hard to describe as directed at anywhere but the UK.⁸⁶ Admittedly the final decision will be for the ECJ when eventually called upon to adjudicate this matter, but the public disagreement between these regulatory bodies can do little to increase the levels of confidence of either suppliers or consumers – something desperately needed if B2C e-commerce is to flourish.

Further comment has been made on the opaque nature of the test in the Green Paper proposing amendments to the Rome Convention where it is said that the opportunity might be taken during that review to reflect upon the meaning of the phrase ‘directs activities to’. This would be particularly welcome if it is decided to amend the text of the Rome Convention to bring it into line with that chosen for the Brussels Regulation so that both instruments refer to the test of ‘directs activities to’.⁸⁷

Zoning

So what is the position in relation to applicable law and jurisdiction for consumer contracts on the Internet? The broad answer is that if a supplier sends a specific invitation or ‘advertises’ his wares on the Internet, and the activities of the supplier are directed to the consumer, then jurisdiction will be at the consumers domicile, and the mandatory consumer protection rules of the consumer’s habitual residence will apply. The devil, however, is in the detail.

Although, as discussed above, the Commission appears to think that disclaimers will not be effective to ring-fence consumer contracts, if the test for interpreting both ‘advertises’ and ‘directs activities to’ is an objective one, then the inclusion of a

⁸⁶ http://www.dti.gov.uk/ccp/topics1/guide/jurisdiction_brussels.htm

⁸⁷ Problems of determining jurisdiction have also arisen where a tort or delict is committed in one jurisdiction but its effects are felt in many others. In an attempt to limit the number of possible fora commentators have suggested a variety of tests including that the website should ‘target’ a particular forum, that the ‘effects’ of the activity are felt in a particular forum, or that a ‘single publication rule’ should be introduced designating the (but only one) most appropriate forum in which a case should be heard. For further details see Edwards (2004) *The Scotsman, the Greek, the Mauritian company and the Internet: Where on Earth Do Things Happen in Cyberspace?* 8 *Edinburgh Law Review* 99-111, W Green, Edinburgh.

disclaimer on a site must be a relevant factor in any analysis by a court. However, the use of such disclaimers will certainly encourage ‘zoning’ of the Internet. In other words, far from being a borderless world, application of the rules encourages suppliers to delimit those jurisdictions in which they are prepared to do business and thus contain the numbers of laws that may be applicable to their transactions.

The US case of *Euromarket Designs Inc. v Crate & Barrel*⁸⁸ is one example of an attempt at zoning. A website run by Crate & Barrel from Ireland said ‘*Goods only sold in the Republic of Ireland*’ a clear attempt to limit the territorial applicability of the site. But unfortunately, at least for Crate & Barrel, the way the site was set up was not consistent with this statement as users were able ‘*to select the United States as part of both their shipping and billing addresses, the fields in which users entered their... addresses were organised for a United States format address, ie., city, state, zip code, and there was evidence that the company sold to at least one person in the forum state through its website.*’⁸⁹ An objective analysis indicated a ‘mixed message’.

Zoning is also encouraged by some regulatory authorities. In Australia a policy statement by the Australian Securities and Investment Commission (ASIC) relating to online offers of securities states⁹⁰:

‘[I]n order not to target persons in Australia... the offeror must... take a variety of precautions designed to exclude subscriptions being accepted from persons in Australia and to check that the precautions are effective... Examples of precautions are not sending notices to, or not accepting applications from, persons whose telephone numbers, postal or electronic addresses or other particulars indicate that they are applying from Australia... It is not acceptable to only use precautions that place the responsibility on the applicant. For example, it is not enough to simply ask an applicant whether they are applying from Australia.’

⁸⁸ 96 F Supp 2d 824 (ND III 2000).

⁸⁹ Smith *Internet Law and Regulation* Sweet & Maxwell, 3rd ed, 2002.

⁹⁰ Australian Securities and Investment Commission (ASIC) Offers of Securities on the Internet. Policy Statement 141 (10 February 1999, reissued 2 March 2000) PS 141.14 at www.cpd.com.au/asic/ps

The purpose here is to advise offshore financial operators as to what they must do in order not to be subject to Australian jurisdiction and laws.

As consumer protection laws become harmonised throughout Europe, will this zoning activity remain necessary? In other words, as consumer protection laws converge so the risk to the trader should lessen. The trader should be aware of the laws that are relevant in a transaction with a consumer. Certainly the trader could still face the risk of being hailed into court in the jurisdiction of the consumer, but the risk of unknown or unknowable laws should be significantly reduced. Therefore a trader should be free to supply consumers throughout Europe knowing the risk he faces.

Such an idea might sound good in theory, but in practice it is likely to be many years before the necessary level of harmonisation is attained.⁹¹ Many of the consumer protection measures are minimum rather than absolute requirements. The period of notice for cancellation of a consumer contract is a case in point.⁹² Further, different national courts will interpret requirements subject to their own rules. The ECJ may be final arbiter in those areas in which it has competence, but it is unlikely that every potential conflict will be raised before that court for adjudication within the foreseeable future.

The smooth path to the Single European Market: alternative routes

Does it all matter anyway? The rules are complex and litigation is likely to be much too expensive for a consumer, particularly when compared to what maybe a transaction of (relatively) small value. The consumer might be much better placed to consider other protective mechanisms.

One avenue might be through a careful choice of method of payment. When concluding a transaction on-line, a consumer may be faced with a number of options, the most common being payment by way of credit or debit card.⁹³ If a consumer

⁹¹ See the example given on p29 fn 58 of the Green Paper.

⁹² Directive 97/7/EC Of The European Parliament And Of The Council of 20 May 1997 on the protection of consumers in respect of distance contracts Article 6.1 Right of Withdrawal '*For any distance contract the consumer shall have a period of **at least** seven working days in which to withdraw from the contract without penalty and without giving any reason*'. [emphasis added].

⁹³ A variety of other options may also be available including PayPal. For information see <http://www.paypal.com/>

chooses to pay by credit card then some comfort may be found in the UK by virtue of Section 75 of the Consumer Credit Act 1974. Subject to a number of requirements⁹⁴ Section 75 of that Act provides that the bank (or other credit grantor) is equally responsible with the supplier for any breach of contract or misrepresentation. This means that the consumer can choose to sue either the bank or the supplier. It had always been unclear as to whether section 75 applied to purchases made abroad, for instance over the Internet. Anecdotal evidence from Trading Standards Officers would suggest that they have successfully assisted consumers in seeking redress from a bank where a purchase has been made from foreign parts. Further, three banks, HSBC, Bank of Scotland and Sainsbury's Bank, have publicly confirmed that they would not differentiate between claims based on where a purchase was made.⁹⁵ In other words, they will extend the protection to purchases made overseas. However, this question on liability has now been referred to the High Court in a test case brought by the Office of Fair Trading against a number of banks. The OFT lost, with the court ruling that purchases made overseas were not so protected.⁹⁶ Whether the banks mentioned above will now change their approach to consumers remains to be seen.

All of which begs the question as to how many people actually do shop on-line in any event, and which of those make purchases from other European countries? In November 2002 a Eurobarometer survey asked a number of questions of consumers about their attitudes to cross border shopping.⁹⁷ Here are some of the questions and the responses:

One in eight Europeans had bought or ordered products or services for private use from shops or sellers located in another EU country during the last 12 months. Of

⁹⁴ The cash price of the item being supplied is over £100 but not more than £30,000; 2. The credit agreement is regulated; 3. The credit grantor is in the business of granting credit and the credit agreement is made in the course of that business; 4. The credit is advanced under arrangements between the credit grantor and the supplier.

⁹⁵ [http://www.oft.gov.uk/News/Press+releases/2002/PN+60-](http://www.oft.gov.uk/News/Press+releases/2002/PN+60-02+Protection+for+credit+card+holders+when+they+shop+abroad.htm)

[02+Protection+for+credit+card+holders+when+they+shop+abroad.htm](http://www.oft.gov.uk/News/Press+releases/2002/PN+60-02+Protection+for+credit+card+holders+when+they+shop+abroad.htm)

⁹⁶ *The Office of Fair Trading v. Lloyds TSB Bank plc, Tesco Personal Finance Limited, American Express Services Europe Limited*. Case No 2003 Folio No 687. QBD (Comm) 12 November 2004.

⁹⁷ Standard Eurobarometer 57.2; Flash Eurobarometer 128; Press and Communication Directorate-General. Public Opinion Analysis Unit. 14 November 2002. Available at http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/eb57-fb128_final_report_en.pdf

those 57% did so when abroad on holiday, 34% when on a trip for shopping and only 18% on the Internet

Reasons given for lack of confidence:

- It is harder to resolve after-sales problems such as complaints, returns and refunds and guarantees 59%
- It is harder to ask public authorities or consumer associations to intervene on my behalf 47%
- A greater risk of practical problems e.g. Delivery hold-ups, errors etc. 44%
- I don't know the consumer protection laws in other EU countries 43%
- I can't trust foreign shops or sellers – there is a greater risk of fraud or deception 36%
- I can't trust the safety of goods and services purchased from foreign shops or sellers 34%
- The lower standards of consumer protection laws in other EU countries 32%
- It is harder to take legal action through the courts 51%

When asked about measures to increase confidence in cross border purchases consumer views were as follows:

- Strengthening consumer protection laws in all EU countries 80% fairly important
- Harmonisation of consumer protection laws 79% fairly important
- If national authorities could intervene on your behalf in other EU countries 43% fairly important.

However and notably, 57% would not buy more even if they were equally confident about making purchases from shops or sellers located in another EU country. Only 19% would buy a little more and only 4% would buy a lot more.⁹⁸

⁹⁸ For an interesting survey carried out by the European Consumer Centres on '*Realities of the European Marketplace: A cross-border e-commerce project by the European Consumer Centre's Network*' see http://www.konsumenteuropa.se/Documents/Engelska/EEC_e-commerce_report.pdf. See also the speech made by David Byrne, (Speech/04/130) European Commissioner for Health and Consumer Protection, 'Consumer Confidence in the Online Marketplace Boosting Competitiveness' at the European Consumer Day Conference in Dublin, 15 March 2004 <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/130&format=HTML&aged=0&language=EN&guiLanguage=en>

It seems there is a room for a vigorous education campaign. It is also interesting to reflect on my own attitude to Internet shopping as a reasonably well-travelled and frequent user of the Internet. I do purchase on-line from other European countries (and further afield). Any decision I make on whether to purchase from a particular supplier is based on my personal knowledge through having shopped there before (brand value and reputation) or on personal recommendation. If I purchase from an unknown supplier (my Sancerre) I will always make a small purchase first and see if it works. If all goes smoothly I might increase the size of future purchases. I will always use my credit card sometimes suffering the indignity of having to pay a premium for the privilege. Have I had any problems? No, never. One member of my family did have a problem with a computer – there was a failure to return the machine after a breakdown had been fixed shortly after it had been purchased. It had been ‘lost’ somewhere in the warehouse. Sadly he had not purchased the machine with his credit card. The supplier was threatened with all sorts of doom laden scenarios including being set upon by Trading Standards Officers as the website did not comply with the Distance Selling Regulations. Eventually, but belatedly, the computer was returned. Will my nearest and dearest ever use that store again? No. Will I, or indeed anyone else to whom I relate this story? No. If I compare this process with my ‘real-time’ shopping habits there are differences. I do exercise a higher degree of caution when making purchases on the Internet from abroad. I am more willing to take the risk of failure upon myself but take steps to manage the size of that risk. But the underlying message from the consumer to the trader is the same. Be honest. Be upfront. You will have nothing to worry about. Except, of course, the rogue consumer.

Finally, it should not be forgotten that there has been an active programme in place in Europe for many years now, the purpose of which is to try and avoid disputes between suppliers and consumers, and if disputes do arise then the intention is to provide a mechanism whereby these can be settled out of court sometimes through on-line dispute resolution.⁹⁹ Further, agreements between regulatory bodies in the EU (such as trading standards officers) have been put into place to assist consumers and

⁹⁹ For full details visit the European Commission Consumer Affairs website at http://europa.eu.int/comm/consumers/index_en.htm

maintain an oversight in relation to on-line B2C trading activity.¹⁰⁰ In reality it is this framework, if both sufficiently resourced and known about by consumers, that is likely to provide the most realistic mechanism for redress in the event that something goes wrong and in turn provide the means by which sufficient confidence can be engendered in the system to encourage consumers to engage in purchasing on-line and suppliers to reach out to consumers in the whole of the EU.

Conclusion

If there is a smooth path to the Single European Market through the creation of rules relating to choice of applicable law and jurisdiction for consumer purchases made on-line, it has yet to be completed. That so many different interests have to be accommodated within the framework, including public and private interests, those of the consumer and the supplier, not to mention the historical traditions and theoretical underpinnings of each of the Member States of the EU in the areas of consumer protection and international private law, inevitably means that there is no easy solution to the risks posed by B2C e-commerce. There will always be a trade-off between certainty through the application of hard and fast rules, and the need for flexibility so that a court can do justice when faced with a particular dispute. Whether an equilibrium between these ideals has yet been attained is open to debate.

¹⁰⁰ See EC Green Paper on Consumer Protection Memo 01/307 at http://europa.eu.int/comm/dgs/health_consumer/library/press/press191_en.pdf